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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' RESPONSE TO SUPPLEMENTAL BRIEF OF THE UNITED STATES

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Appellants respond to the Government's *amicus curiae* brief in the following respects:

I.

In its brief the Government states:

> "We do not argue that Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment.
>
> * * *
>
> "Neither petitioners nor the United States is arguing that the Court should undertake to hold that places of public accommodation must serve all members of the public alike without regard to race or color."

These Appellants, however, have argued both in their brief on the merits and during oral argument that Shell's City had an affirmative obligation to *serve* Appellants and that its *refusal to serve* constituted a denial of the equal protection of the laws. Part II of Appellants' main brief is devoted to that proposition, and in the introduction thereto Appellants submitted that:

> "Apart from the participation of the police and the state courts herein, the discriminatory action of Shell's City itself constituted state action, since by virtue of the Florida restaurant licensing law, Florida Statutes Chapter 509, together with the regulations promulgated thereunder, the State has, within the meaning of the BURTON

v. WILMINGTON PARKING AUTHORITY, 'so far insinuated itself into a position of interdependence' with restaurants 'that it must be recognized as a joint participant in the challenged activity.'" (P. 19)

In *Burton* the very relief sought by the Negro plaintiff was an injunction against the lessee, Eagle Coffee Shoppe, Inc., to prohibit it from refusing to *serve* him on the ground of race alone. See the Chancellor's opinion in 150 A. 2d 197. Accordingly, and to the extent that Appellants' case is bottomed upon the holding and rationale of *Burton*, and because of the extensive involvement of the State of Florida herein through its supervision over restaurants by way of its licensing laws and regulations, Appellants submit that *complete* constitutional adjudication of this cause requires a holding that Shell's City, like Eagle, had a positive and affirmative constitutional obligation to serve the Appellants.

II.

The Government adverts, as did Appellants, to the concurring opinion in *Burton*, where Mr. Justice Stewart said that:

> "The highest court of Delaware has thus construed the legislative enactment as authorizing discriminatory classification based solely on color."

Not only is the position of the Florida Supreme Court no different here than was that of the Delaware Supreme Court in *Burton*, but the Attorney General of Florida has himself just publicly proclaimed the racially discriminatory effect of the Florida Statute in question. In response to

an inquiry from the County Attorney of Dade County, the Attorney General issued an opinion dated February 3, 1964 wherein he stated that:

> "This is in response to your letter of January 17, 1964, requesting the opinion of this office as to whether the Board of County Commissioners of Dade County have the power to prohibit discrimination upon the basis of race or creed by the owners and operators of public lodgings and public food service establishments and to prescribe penalty for the violation of such prohibition.
>
> **I concur with your conclusion that such legislation would conflict with Section 509.092, Florida Statutes, and would therefore be prohibited by Article IX, Section 11, Florida Constitution, as being in conflict with a general state statute,** *Dade County v. Mercury Radio Service, Inc.*, 134 So. 2d 791. The constitutionality of Chapter 509, Florida Statutes, has been challenged in the case of *Robinson et al v. State.* This case was argued before the United States Supreme Court in October of last year and a final decision is expected before the end of the present term of that court, which is June 1, 1964.
>
> In view of the fact that the United States Supreme Court will answer the question within the very near future finally deciding the issues before it, I will adhere to the established policy of my predecessors in office, of which you are familiar, and not render an opinion on the constitutionality of the statute when the matter is pres-

ently before the courts for final determination." (Emphasis supplied)

In view of this pronouncement, the State clearly cannot argue that the statute and the public authority are simply "neutral" in this contest. The statute, as thus construed by the Attorney General himself, clearly authorizes racial discrimination and as effectively as did the Delaware statute in *Burton*. Since the statute as thus construed *prohibits* the county from enacting a public accommodations law, and since it is the only provision of State law cited as inhibiting this exercise of municipal authority, it thus aligns the State on the side of racial discrimination and blocks any effort at remedial racial legislation by the local authorities. In *District of Columbia v. John R. Thompson Company, Inc.*, 346 U.S. 100, this Court upheld the constitutional authority of municipalities to enact anti-segregation ordinances as applied to places of public accommodation. The Florida statute, as construed by the Attorney General, expressly prohibits the exercise of such authority and, therefore, in all practical respects makes the State a partner to every act of racial discrimination in Florida restaurants.

Respectfully submitted,

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By_____
Alfred I. Hopkins

CERTIFICATE OF MAILING

I, ALFRED I. HOPKINS, counsel for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on February _____, 1964, I served copies of the foregoing Appellants' Response to Supplemental Brief of the United States, by mailing a copy thereof in a duly addressed envelope with postage prepaid to HON. RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida; to HON. JAMES W. KYNES, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida; and to HON. ARCHIBALD COX, Solicitor General of the United States, Department of Justice, Washington, D. C.

_____

Alfred I. Hopkins